

# OML AO 5655

**From:** [dos.sm.Coog.InetCoog](mailto:dos.sm.Coog.InetCoog)  
**To:** [Beecham, Brett](#)  
**Subject:** RE: Opinion re: POL Section 103(a)  
**Date:** Thursday, June 9, 2022 10:11:00 AM

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*The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence.*

Good Morning,

The Open Meetings Law (OML), as amended by Chapter 56 of the Laws of 2022, is silent with regard to the procedural requirements of the public hearing mandated by Section 103-a(2)(a). Our recommendation would be to follow whatever general procedures governs Authority public hearings or, in the absence of such procedures, ensuring reasonable public notice and opportunity to comment by the public prior to passage of the resolution.

OML AO 5641 was prepared during the brief period of time in the summer of 2021 when neither an Executive Order nor legislation was in place suspending the in-person requirement of the OML. While Chapter 1 of the Laws of 2022 is in effect, a public body may permit a member to participate “by conference call or similar service provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.” It is our interpretation of Chapter 56 of the Laws of 2022 that public bodies may continue to operate now as they did before the onset of the pandemic (if you were permitted to do it before the pandemic, this law does not change that).

However, in my view, members of a public body have never been authorized to participate by teleconference. Section 102(1) of the OML defines the term “meeting” as “the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.” The advisory opinion which you reference was prepared prior to the amendment to the OML authorizing the use of videoconferencing (Chapter 289 of the Laws of 2000) and prior to a Second Department, Appellate Division decision which held:

Since the amendment to General Construction Law § 41 recites that a quorum may be constituted only by a majority of the board gathered together in each other's presence or through the use of videoconferencing, it must therefore be inferred that the omission by the Legislature of telephonic participation was intentional.

*Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484, 485–86 (2d Dept., 2005) (*Internal citation omitted, emphasis added*).

In short, it is our opinion that the Law only authorizes members to participate in a meeting subject to the OML if they are physically present at locations that have been properly noticed and are open to the public or through the use of videoconferencing under “extraordinary circumstances” as authorized by section 103-a.

I hope this information proves useful.

Sincerely,

## **Kristin O'Neill**

Assistant Director

Pronouns: she/her/hers

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**From:** Beecham, Brett <brett.beecham@bpca.ny.gov>

**Sent:** Wednesday, June 8, 2022 4:05 PM

**To:** dos.sm.Coog.InetCoog <dosCOOG@dos.ny.gov>

**Subject:** Opinion re: POL Section 103(a)

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Hello.

I am an attorney for the Battery Park City Authority and have two questions related to the addition of POL Section 103(a):

1) Pursuant to paragraph 2(a), a public body may adopt a resolution, *following a public hearing*, authorizing the use of videoconferencing. I am not able to find any guidance as to what constitutes a public hearing for these purposes. Section 202 of the State Administrative Procedures Act sets forth hearing requirements for the adoption of a rule, however this board action (i.e., adoption of a resolution authorizing the use of videoconferencing) is expressly excluded from the definition of a rule in SAPA Section 102 paragraph 2(b)(1), as it concerns "the internal management of the agency which do[es] not directly and significantly affect the rights of or procedures or practices available to the public." Would it be sufficient to notify the public of the proposed resolution in the monthly, published board meeting notice and invite public comment which will be discussed at the next meeting before consideration of the resolution?

2) In OML AO 5641 you state that "Since the rescission of Executive Order 202.1, there is no

longer any authority for a public body to conduct a meeting by teleconference or for a member of a public body to participate or vote in a meeting by teleconference." It is my understanding from the information session I attended that anything we could do before Covid, we can still do. Before COVID, members were allowed to *participate* by teleconference -- although they were not counted toward quorum and could not vote. In OML AO 2480, it states that "I believe that the Commission could choose to enable the absent member to participate by phone" but that he "could not in my opinion vote or otherwise be counted as a member for the purpose of Section 41 of the General Construction Law or Open Meetings Law." Can you please clarify whether members are now allowed to participate in a board meeting by teleconference, but not vote or count toward quorum?

Thank you.

Regards,

**Brett Beecham**

Associate General Counsel

**Battery Park City Authority**

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